In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 13

UNITED STATES OF AMERICA, PETITIONER

v.

FRED URBETEIT, CLAIMANT OF 16 ARTICLES OF DEVICE, MORE OR LESS, LABELED "SINUOTHERMIC," ETC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

Respondent states in his brief (p. 8) that the Government "reluctantly admits that the Circuit Court of Appeals was correct in holding the District Court in error" for excluding the testimony offered by respondent as to (1) the benefits claimed to have been received by various patients through use of the Sinuothermic device, and (2) respondent's alleged success in diagnoses and treatments made with the machine (see R. 162–163). Since this statement of the Government's position is not accurate, we are submitting this supplemental memorandum for the purpose of

809255—48

avoiding any misunderstanding which might otherwise result.

When this testimony was offered at the trial, Government counsel objected on several specific grounds. This objection was sustained by the district court (R. 163). The Government contended in the court below that this ruling by the trial court was entirely proper, and we have in no respect receded from that position. The Government's position is that, even if it be assumed *arguendo* that the proferred testimony was erroneously excluded, the decree of condemnation entered by the district court was nevertheless correct. The Government was entitled to such a decree if any of the various claims in the labeling was false or misleading. The evidence as to the falsity of the diagnostic claims made for the machine was overwhelming, and included respondent's own admissions (see R. 129–130, 182). The excluded evidence related only to the claims of therapeutic or curative value (R. 158–163). Consequently, even if it be assumed that the exclusion was erroneous, such error could not have been prejudicial.

In these circumstances, the petition for certiorari filed by the Government stated (page 12, note 3) that "Error is not assigned as to the rulings below with respect to the exclusion of evidence by the trial court." This statement was made in order to limit the review by this Court

to the issue of statutory construction involved, and not, as respondent believes, to constitute an admission that error had been committed by the district court.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.

OCTOBER 1948.

U. S. GOVERNMENT PRINTING OFFICE: 1948